No. 17-419

In the Supreme Court of the United States

JAMES DAWSON AND ELAINE DAWSON,

Petitioners,

v.

DALE W. STEAGER, AS STATE TAX COMMISSIONER OF WEST VIRGINIA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

SUPPLEMENTAL BRIEF FOR RESPONDENT

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SUPPLEMENTAL BRIEF FOR RESPONDENT

On May 15, 2018, the Solicitor General filed a brief in response to this Court's invitation to express the views of the United States. Respondent respectfully submits this supplemental brief in response.

ARGUMENT

For the reasons set forth in the Brief in Opposition, Respondent disagrees that the West Virginia Supreme Court of Appeals "misapplied the doctrine of intergovernmental tax immunity." U.S. Br. 6. The United States does not dispute that in the almost thirty years since this Court's decision in *Davis* v. *Michigan Department of the Treasury*, 489 U.S. 803 (1989), no lower court has invalidated a narrow tax exemption such as the one at issue here—where eligibility turns on the particular retirement plans in which certain state law-enforcement retirees are enrolled, and all-told the exemption applies to less than 2% of the state's retired workforce. Pet. App. 13a, 16a. *Davis* does not require such a result, and to hold otherwise would depart from this Court's "narrow approach to intergovernmental tax immunity" by "extend[ing] the doctrine beyond the tight limits this Court has set." *Jefferson Cnty.* v. *Acker*, 527 U.S. 423, 436-37 (1999).

Nevertheless, review would not be warranted even if the court below had misapplied the doctrine of

intergovernmental tax immunity. The United States acknowledges that deciding whether the case is a worthy candidate for review "presents a closer question," yet believes the case offers "a better vehicle" than similar petitions this Court has denied. U.S. Br. 6-7. This view is based on a misperception of the record. When corrected, the "closer question" shifts in favor of denial.

The United States argues this case presents a clean vehicle because the circuit court "found it 'undisputed . . . that there are no significant differences between Mr. Dawson's powers and duties as a U.S. Marshal and the powers and duties of the state and local law enforcement officers' who receive the full exemption [under W. Va. Code § 11-21-12(c)(6)]," and the Supreme Court of Appeals "did not analyze that question." U.S. Br. 19 (quoting Pet. App. 22a.). The circuit court, however, found only that there were no significant differences between the job duties involved in Mr. Dawson's federal position and some of the state law enforcement positions eligible for the Section 12(c)(6) exemption—not that there were no *other* differences that may be relevant to *Davis*'s "significant differences" inquiry. 489 U.S. at 816.

The incomplete, limited nature of the circuit court's holding matters, because under West Virginia law job duties are only one facet of whether a

particular retiree qualifies for the exemption. In other words, the brief of the United States relies heavily on the circuit court's finding that Mr. Dawson's job duties were similar to those of the state law-enforcement retirees who receive the Section 12(c)(6) exemption, but it ignores the fact that not *all* state law-enforcement officers qualify. For example, Mr. Dawson frequently compared himself to retired West Virginia deputy sheriffs. *See, e.g.*, SCA Resp. Br. 16. Yet although many retired deputy sheriffs receive the Section 12(c)(6) exemption, others receive the standard $2,000 exemption available to all state retirees—and to Mr. Dawson. Pet. App. 13a. The difference turns on the specific retirement plan from which any particular retired deputy sheriff draws benefits. *Ibid.* Not all retired state law-enforcement officers receive the Section 12(c)(6) exemption, and the state courts did not resolve whether there are other significant differences between Mr. Dawson and the state retirees with whom he seeks to be compared. The circuit court's finding about job duties generally thus cannot answer whether Mr. Dawson is "similarly situated" to the small subset of state retirees who qualify for the Section 12(c)(6) exemption, or rather if he is similarly situated to those who—despite also retiring from positions involving law-enforcement duties—do not.

As a result, this case is much like *Brown* v. *Mierke*, 443 S.E.2d 462 (W. Va. 1994), where this Court denied

certiorari, 513 U.S. 877 (1994). The United States acknowledges that *Brown* was a weak vehicle for review because it was "unclear whether th[e] plaintiffs were similarly situated to any state retirees who received more favorable tax treatment." U.S. Br. 18. The same is true here.

Finally, the issue presented in the Petition does not, as the United States argues, involve "sufficient legal and practical importance to warrant the Court's review." U.S. Br. 7. With considerable understatement, the United States recognizes that "intergovernmental-tax-immunity issues have not arisen with great frequency." U.S. Br. 6-7. The cases the United States (like Petitioner) cite as purported evidence of division in state courts of last resort date from 1992 to 1996. When these cases arose over twenty years ago, this Court denied three petitions raising similar questions. U.S. Br. 7 & n.4. One of those denials was the petition concerning *Brown*—in which the West Virginia Supreme Court of Appeals analyzed the same state tax regime and reached the same conclusion. There is no reason to depart from that course now. Indeed, the Section 12(c)(6) exemption now applies to an even smaller percentage of state retirees than when *Brown* was decided, even though it has been extended to include some deputy sheriffs. Pet. App. 16a. And nationwide, the trend has been toward extending identical tax treatment to state and federal retirement income. *See* NAT'L

CONFERENCE OF STATE LEGISLATURES, STATE PERSONAL INCOME TAXES ON PENSIONS AND RETIREMENT INCOME: TAX YEAR 2014, at 2 (Apr. 3, 2015). The extremely narrow implications of the decision below do not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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